Global sequential auctions would create overwhelming regulatory uncertainty and prohibitively increase the cost of providing Little LEO services.[72] Furthermore, auctioning Little LEO spectrum may make it more difficult for the Commission to secure additional NVNG MSS spectrum at WRC-97 by creating a false perception that the U.S. is attempting to grasp more "valuable" spectrum.[73]

The potential harm to U.S. industry caused by auctions would not be limited only to the domestic NVNG MSS industry but also could compromise other satellite industry segments and other U.S. interests. To the extent that auctions may undermine the U.S. position in international negotiations, there is a potential threat of loss to the satellite industry generally with respect to further breakdown in ITU processes, increased a priori planning and decreased flexibility for U.S. allocations.[74] In addition, foreign country auctions could lead to huge monetary outflows from U.S. industry to foreign administrations and benefit foreigners to the detriment of U.S. taxpayers.[75] Furthermore, the record supports Final Analysis's view that auctions could conflict with U.S. treaty obligations to coordinate satellite systems internationally.[76]

---

[72] See Orbcomm Comments at 48; CTA Comments at 28-29. Not all countries using auctions have appropriate legal or regulatory systems, let alone financial markets to make launching a Little LEO service subject to auctions economically feasible. See Lockheed Martin Comments at 4.

[73] See Orbcomm Comments at 49.

[74] See SIA Comments at 2; E-Sat Comments at 4.

[75] See CTA Comments at 29 (citing "Public Harms Unique to Satellite Spectrum Auctions," a Study prepared for the Satellite Industry Association, March 18, 1996); SIA Comments at 2.

[76] See, e.g., GE-Starsys Comments at 23.

C. The Record Demonstrates That the Commission Lacks Authority to Conduct Auctions of Little LEO Spectrum.

Final Analysis's assertion that the Commission lacks authority to auction Little LEO spectrum is strongly supported in the record.[77] Use of auctions in this context would undermine rather than advance the public interest objectives set forth in Section 309(j)(3) of the Communications Act of 1934, as amended.[78] Specifically, Section 309(j)(3)(A) provides that an auction is warranted if it will promote the rapid deployment of new technologies and services. In the Little LEO context, however, auctions would increase delays and other barriers to deployment of Little LEO service, which is already subject to several risks and costs, by complicating coordination and discouraging investment.[79] Auctions also are warranted under the statute only if they would promote economic opportunity and avoid excessive concentration. See 47 U.S.C. § 309(j)(3)(B). The record shows, however, that auctions may actually exclude certain opportunities for non-profit service providers[80] and lead to concentration especially if limited to current applicants.[81] Furthermore, auctions may frustrate the goals of Section 309(j)(3)(C) of recovering the value of Little LEO spectrum.[82] The potential of multiple, sequential auctions around the world following a

---

[77] See Final Analysis Comments at 35-42.

[78] 47 U.S.C. § 309(j)(3). See, e.g., L/Q Licensee Comments at 5-10.

[79] See Final Analysis Comments at 39-41; CTA Comments at 30; Iridium Comments at 7, 10; SIA Comments at 1-2, Lockheed Martin Comments at 4, 6; Leo One USA Comments at 61.

[80] See VITA Comments at 9.

[81] See CTA Comments at 32.

[82] See E-SAT Comments at 4.

U.S. auction would make valuation extremely difficult, if not impossible, and would skew results in the U.S. auction because of the great uncertainties concerning the total amount that might have to be paid for the global system. Finally, auctions would undermine the spectrum efficiency goals of Section 309(j)(3)(D) by discouraging innovation and shared use, and forcing applicants to forego potentially more efficient spectrum use and sharing plans in order to fit into spectrum blocks preordained for auction purposes.[83]

Auctioning NVNG MSS sectrum also would lead to inefficient and unfair results. As CTA observes, the Commission has determined that spectrum-based services shared among multiple licensees should not be auctioned because mutual exclusivity, by definition, cannot exist in a shared service.[84] Auctioning of NVNG MSS spectrum also would lead to disparate results where second round licensees would have to pay for non-exclusive spectrum while existing service providers with whom second round licensees would have to share the spectrum received their spectrum without paying for it.[85] Furthermore, serial auctions could create opportunities for speculators whose sole reason for bidding in other markets would be to seek to extract payment from the actual operator of a satellite system.[86]

D. Other Options Exist for Resolving Potential NVNG MSS Mutual Exclusivity.

---

[83] See Iridium Comments at 8; Orbcomm Comments at 52.

[84] See CTA Comments at 30-31 (citing Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, PP Docket No. 93-253, FCC 94-61 at ¶ 13 (released April 20, 1994).

[85] See E-SAT Comments at 4.

[86] See Lockheed Martin Comments at 8 (citing Reed E. Hundt, Comments Before the Center for Strategic and International Studies, Washington, D.C. (December 17, 1996)).

The record is clear that the Commission should not use auctions where other more effective methods, such as alternative band-sharing plans, a virtual constellation or negotiated rulemaking and other alternative dispute resolution mechanisms, are available.[87] Tailoring licensing rules by means of strict eligibility requirements, technical efficiency standards and expanded frequency bands are more effective and less intrusive methods of reducing mutual exclusivity than resorting to auctions.[88]

Moreover, it may be unwarranted for the Commission peremptorily to reject comparative hearings in favor of auctions to resolve potential mutual exclusivity where comparative hearings have not been tried in satellite services and the drawbacks associated with that licensing procedure have arisen primarily in the context of broadcast licensing.[89] While the Commission has assiduously endeavored to avoid the need for comparative hearings in satellite services, the Commission is obligated to determine whether such an approach would be more in the public's interest in this case than auctions.

Furthermore, as Section 309(j)(6)(E) of the Act provides, the Commission should explore other alternative dispute resolution mechanisms at its disposal such as negotiated rulemakings and other mediation techniques in order to effectively resolve potential mutual exclusivity before resorting to auctions.[90] Accordingly, the Commission should not assume

---

[87] See Final Analysis Comments at 35-39; accord CTA Comments at 30; Iridium Comments at 6; Orbcomm Comments at 52-3; GE-Starsys Comments at 25.

[88] See CTA Comments at 30.

[89] See Iridium Comments at 6; Orbcomm Comments at 52.

[90] See Final Analysis Comments at 36; Orbcomm Comments at 53; Starsys Comments at 25. In its its January 8, 1997 comments on Leo One USA's and CTA's January 3, 1997 joint Motion for Deferral, Final Analysis in fact proposes the use of some of these techiques (continued...)

that auctions are the best method of licensing Little LEO spectrum when so many other more effective means of resolving mutual exclusivity are available.

VII. COMMENTERS STRONGLY AGREE ON OTHER KEY LICENSING ISSUES

A. The Commission Should Make More Spectrum Available to the Non-Voice, Non-Geostationary Mobile Satellite Service.

The record shows a clear consensus among NVNG MSS parties that lack of spectrum is a primary barrier to entry into the Little LEO service and additional spectrum must be made available to the NVNG MSS industry to reap full public benefits.[91] As Final Analysis has demonstrated, availability of spectrum allocated at WRC-95 will facilitate the more efficient use of WARC-92 spectrum and help accommodate all second round applicant spectrum requirements.[92] Allocating spectrum from WRC-95 and future spectrum secured at WRC-97 and future WRCs to the second processing round, therefore, is critical to meeting spectrum demand for NVNG MSS services.

Allocating additional spectrum from WRC-95 and WRC-97 to the second processing round is important to accommodate new entry by allowing new entrants effectively to meet business requirements. Furthermore, as Leo One USA properly asserts, foreclosing existing licensees from ever being eligible for additional spectrum in the future may be overbroad.[93]

---

[90](...continued)
by the Commission in this proceeding to resolve ambiguities and outstanding issues that continue to hamper an industry settlement of the second round. See, e.g., Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991).

[91]See Final Analysis Comments at Exhibits 1 and 2; see also Leo One USA Comments at 37-38.

[92]See Final Analysis Comments at 29-31 and Exhibit 3.

[93]See Leo One USA Comments at 37-38.

The Commission may advance its competitive goals by initially limiting eligibility to the second processing round until markets are fully competitive, and reaching a determination as to the public interest benefits of allocating additional spectrum to existing licensees only after markets will have been allowed to become fully competitive.[94] Limiting eligibility for additional spectrum secured at WRC-95 and WRC-97 initially to the second processing round also is justified in light of the significant financial and political resources expended internationally by some second round applicants in seeking to secure additional spectrum at the WRCs.[95]

Allocation of WRC-95 spectrum to second round Little LEO operations will not conflict with terrestrial land mobile operations in the 450-460 MHz band. The record reflects potential petroleum, oil spill emergency response and railroad industry concerns regarding coexistence of Little LEO operations with land mobile communications in portions of the 450-460 MHz band.[96] NVNG MSS operators will use modulation techniques that are

---

[94]See id; see also E-SAT Comments at 16.

[95] See Final Analysis Comments at 31-35; CTA Comments at 26-27. See Letter from Scott Blake Harris, Chief, International Bureau, FCC, to Nader Modanlo, Final Analysis, Inc., dated May 12, 1995 (acknowledging Final Analysis's efforts in its experimental program as critical to identifying and securing spectrum for allocation to Little LEO's at upcoming WRCs). Final Analysis has been an active contributor to ITU Radio Communication Study Group 8D and IWG-2A on studies of NVNG MSS spectrum demand and availability and sharing criteria. See ITU-R Document 8D/136, "Spectrum Demand for Non-GSO MSS Below 1 GHz Services," attached to Final Analysis Comments at Attachment B.

[96]Cf. American Petroleum Institute Comments (filed December 20, 1996); Association of American Railroads Comments (filed December 20, 1996); Clean Caribbean Cooperative Comments (filed November 27, 1996); Clean Channel Association Comments (filed November 26, 1996); Clean Sound Comments (filed November 27, 1996); Cook Inlet Spill Prevention & Response, Inc. Comments (filed November 29, 1996); Garner Environmental

(continued...)

highly effective in preventing interference with land mobile operations. For example, for operations on 450-460 MHz uplink frequencies allocated at WRC-95, Final Analysis will use its Scanning Telemetry Activity Receiver System ("STARS") to avoid interference with land mobile communications. In operation, the STARS receiver on-board the satellite will scan the band in steps and identify unused channels. These unused channels will be assigned as uplink frequencies for the remote terminals and mobile terminals.[97]

Furthermore, one of the main purposes of Final Analysis's current experimental satellite program with FAISAT-2v, and its predecessor FAISAT-1, is to identify efficacious techniques for sharing with various land mobile services by means of scanning modulation techniques such as the STARS system.[98] Final Analysis thus has demonstrated its willingness and technical capability to employ effective modulation and interference protection techniques to facilitate coexistence of its Little LEO uplink operations with important land mobile operations such as the petroleum, oil spill emergency response and railroad sectors on the 450-460 MHz band.

Furthermore, it must be recognized that the services which are the subject of concern to the petroleum and railroad commenters are also in the market plans of many NVNG MSS applicants, including Final Analysis. Thus, rather than interfering with such services, NVNG

---

[96](...continued)
Services, Inc., Comments (filed December 5, 1996); Texaco Comments (filed December 23, 1996); Texas General Land Office Comments (filed December 27, 1996); U.S. Oil & Refining Co. Comments (filed November 26, 1996).

[97]This scanning interference-avoidance system is an enhanced version of a dynamic channel avoidance assignment ("DCAAS") system.

[98]See Final Analysis, Inc., Application, File No. 4682-EX-PL-95 (filed March 3, 1995); Final Analysis, Inc., Experimental Authorization for FAISAT-2v, Call Sign KS2XCY.

MSS operators may be viewed as offering an alternative means of providing such services, and potentially on a more cost effective basis.

The record supports the Commission's tentative observation in the Notice that it is not legally obligated to open each and every frequency for competing applications before assigning it.[99] Moreover, as Final Analysis stated in its comments, it is well-settled that the Commission is acting within its public interest mandate to allocate additional spectrum to existing licensees without inviting additional applications where such an allocation would allow existing licensees to meet growth in demand and accommodate potential future changes in technical interference and system configuration requirements.[100]

B. Efficient Use of NVNG MSS Spectrum Can Be Ensured Under Existing Qualification Rules with the Addition of Milestone Requirements.

The record clearly establishes that no purpose is served by the proposal in the Notice to apply the domsat financial qualification standard to Little LEO second round applicants to require that they demonstrate sufficient finances necessary to construct, launch and operate an entire system for one year.[101] Leo One USA's assertions that the domsat standard is appropriate are unsupported and misplaced.[102]

---

[99]See Notice at ¶ 78 (citing Rainbow Broadcasting v. FCC, 949 F.2d 405, 409-410 (D.C. Cir. 1991); CTA Comments at 27.

[100]See Final Analysis Comments at 30-31.

[101]Cf. Notice at ¶ 40 (citing Licensing Space Stations in the Domestic Fixed-Satellite Service, FCC No. 85-395, CC Docket No. 85-135 (released August 29, 1985) ("1985 Domsat Order"); 47 C.F.R. § 25.140(c)).

[102] See Leo One USA Comments at 38. Leo One USA merely cites to the Commission's "experience" with the domsat test, with no acknowledgment or analysis of the different circumstances that exist in the case of NVNG MSS systems. Again, Leo One is the only commenter to support an approach that all others in the record find objectionable. Similar to (continued...)

Other commenters agree with Final Analysis[103] that the domsat test is not reasonably related to the actual system financing requirements of NVNG MSS systems. It makes little sense to require a financial showing for an entire constellation for a year when it will take several years for any licensed operator to get a full constellation in place. Moreover, completely unlike the case for domsats or even Big LEOs, NVNG MSS operators may initiate service and begin to earn revenues with just one or two satellites. Such revenues will serve as a foundation for the additional financing needed over the following several years to implement a full constellation. In any event, the fact that an applicant may have all of the financing up front for a full constellation does not ensure that that applicant actually will ultimately implement its constellation as planned. If the technical design of the system is ill conceived or a business plan badly designed or executed, a full constellation may never be implemented. Thus, in the context of NVNG MSS, demonstration of financial capabilities to launch the initial two satellites fully meets the purpose of the financial qualifications test to avoid licensing of an underfinanced applicant who may not implement its system.[104] In the NVNG MSS service, avoidance of inefficient use of spectrum through failure to implement full constellations will have as much to do with the technical expertise and marketing approaches of licensees as anything. In this regard, exclusive reliance on financial

---

[102](...continued)
their position on auctions, this position by Leo One USA contrasts sharply with the weight of the record and, as it is unsupported, is not credible.

[103] See CTA Comments at 15-17; E-SAT Comments at 17-18.

[104]See Notice at ¶ 39.

qualifications does not really serve the public interest or achieve the desired objectives, and equal attention to technical qualifications is warranted.

Second, use of a domsat test would lead to unfair and contrary results. Given the different sizes of proposed systems, a full system rule would unfairly lead to uneven financial burdens on applicants, essentially imposing vastly different qualification standards on licensees for exactly the same service. In contrast, a two-satellite rule, which reasonably reflects relevant real world fianance issues, would fairly place the same burden on all applicants in the round.

Finally, Final Analysis agreed with CTA that applying the domsat full system rule to second round applicants would be discriminatory where first round licensees were allowed to show compliance under the two-satellite test.[105] All of these factors combined would render the domsat financial test arbitrary and capricious in the context of NVNG MSS systems.

In any event, even Leo One USA agrees that due diligence ("use or lose") milestones would help ensure efficient use of NVNG MSS spectrum.[106] Due diligence milestones are a traditional qualifying criteria for satellite services.[107] In addition, to the extent that milestones are imposed on second round Little LEO licensees, regulatory parity requires that they also be required of first round licensees as well. Final Analysis submits that such due

---

[105] CTA Comments at 16.

[106] See Leo One USA Comments at 23.

[107] See Final Analysis Comments at 43-44.

diligence milestones also can and should be imposed on first round licensees, without prejudice to their interests under their current authorizations.

C. The Commission Should Not Unduly Burden NVNG MSS With Mandatory Radio Location Requirements to Prevent Unauthorized Transmissions

The NVNG MSS parties agree that the Commission should not burden NVNG MSS service providers with mandatory position location requirements in order to protect against unauthorized transmissions in foreign countries.[108] Such requirements could have significant adverse consequences for the affordability of the service without necessarily providing much greater protection than already exists through normal enforcement means. Furthermore, as Final Analysis demonstrated in its comments, less cost-prohibitive measures than a blanket position determination requirement are already being explored internationally which will help prevent unauthorized transmissions.[109]

D. The Record Overwhelming Demonstrates that There Should Be No Exclusive Arrangements in Little LEO Services.

CTA is the only party arguing that exclusive arrangements should be allowed.[110] However most other parties agree that exclusive arrangements should not be permitted.[111] Exclusivity is contrary to the general direction of U.S. international policies. Accordingly, the Commission should not allow exclusive arrangements in Little LEO services.

---

[108]See, e.g., Final Analysis Comments at 49; CTA Comments at 34; Leo One USA Comments at 66-69; GE-Starsys Comments at 27-28.

[109]See Final Analysis Comments at 49.

[110]See CTA Comments at 34.

[111]See, e.g., Leo One USA Comments at 69; ORBCOMM Comments at 57-58; GE-Starsys Comments at 29.

VIII. FINAL ANALYSIS MAY NOT BE EXCLUDED FROM THE SECOND ROUND UNDER THE COMMISSION'S PROPOSED AFFILIATION RESTRICTIONS

Commenters claiming that Final Analysis should be excluded under the Commission's proposed affiliation rules misconstrue the arrangement between Final Analysis and VITA and misapply the Commission's proposed affiliation test. In this regard, the arguments of LEO One and CTA misstate relevant case law and are misleading. In any event, they are wholly without merit. Exclusion of Final Analysis is not required by the letter of the proposed affiliation rule, is not consistent with the stated intent of the proposed affiliation rule, would be contrary to the public interest and is not necessary to avoid mutual exclusivity.

A. Final Analysis's Agreement with VITA Does Not Constitute a Prohibited Affiliation

Leo One USA and CTA wrongly assert that the Final Analysis/VITA agreement allows Final Analysis to exercise control over VITA.[112] The Final Analysis/VITA agreement does not give Final Analysis "control" over VITA as defined by the Commission's proposed affiliation and attribution rules. Furthermore, it is well-settled under Commission precedent that an agreement such as the one between Final Analysis and VITA does not vest Final Analysis with de jure or de facto control over VITA's operations. The agreement also is consistent with the underlying purpose of the Commission's proposed affiliation rule -- to prevent first round licensees from inhibiting new entry in the second processing round by improperly exercising ownership or control over second round applicants. In this regard, the agreement does not give VITA an ownership or an attributable interest in Final Analysis's second round application.

---

[112]See Leo One USA Comments at 21-22; CTA Comments at 5-6.

1. The Final Analysis/VITA Agreement Is Not A Joint Marketing or Joint Operating Agreement

Contrary to Leo One USA's claim,[113] the Final Analysis/VITA agreement does not constitute a "joint operating" or "joint marketing." Moreover, the Commission considers interests in joint marketing and joint operating arrangements to be attributable only to the extent that they "convey to their holders a realistic potential to influence the operations of the licensee in core areas such as programming and competitive practices."[114] With respect to joint marketing and joint operating arrangements among broadband PCS, cellular or SMR licensees, for example, the Commission considers an agreement to vest a party with an attributable interest only if it authorizes the holder of the interest:

> . . . to make decisions or otherwise engage in practices or activities that determine, or significantly influence (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services.[115]

These circumstances do not exist here.

The Final Analysis/VITA arrangement is an arm's length commercial capacity arrangement. Under the agreement, Final Analysis will construct and launch a satellite containing two payloads: the VITA payload, which will operate on the frequencies licensed to VITA, and the Final Analysis payload, which will operate on the frequencies that have

---

[113]Cf. LEO One USA Comments at 22.

[114]See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rulemaking, 10 FCC Rcd 3606, 3651 (1995) ("Broadcast Attribution Notice").

[115]See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Fourth Report and Order, 9 FCC Rcd 7123, 7130 (1994).

been licensed on an experimental basis to Final Analysis.[116] VITA will retain the right to 100% of the communications capacity on its frequencies and will lease 50% of the capacity to Final Analysis.[117] VITA will use the remaining 50% of its frequencies for its humanitarian and non-commercial purposes; will establish the technical specifications for its frequencies; will direct the operation and use of the signals on these frequencies; and will be responsible to the FCC as the licensee.[118] By its terms, therefore, the Final Analysis/VITA agreement does not constitute an attributable joint operating agreement that gives Final Analysis control over VITA's frequencies.

The agreement does not call for any sharing of marketing or operations, and there is no sharing of revenues or debt obligations. Furthermore, the terms of the agreement explicitly provide that Final Analysis and VITA will serve separate customers and maintain completely different business plans that remain under the sole control of each separate party. Accordingly, the Final Analysis/VITA agreement does not give Final Analysis "control" over VITA's marketing or other operations.

Furthermore, the purpose of the Commission's proposed affiliation restriction is not implicated in the Final Analysis/VITA agreement. As even Leo One USA is forced to admit, the purpose of the affiliation rules proposed in the Notice is to prevent existing licensees from exerting control or influence over a new licensee, thereby inhibiting new entry

---

[116]See Notification of Volunteers in Technical Assistance Regarding its Application for Authority to Construct, Launch, and Operate a Non-Voice, Non-Geostationary Mobile Satellite, File No. 40-SAT-P/LA-96 at 2 (received January 16, 1996). VITA submitted the Final Analysis/VITA agreement to the Commission in an attachment to this notification.

[117]See id.

[118]See id.

into the Little LEO marketplace and undermining the Commission's competitive goals for the service.[119] Therefore, under the Commission's proposal, the key concern with respect to the Final Analysis/VITA agreement would be whether VITA has an incentive or ability to influence or control Final Analysis (to gain access to spectrum otherwise to be licensed to an independent and competitive second round entity). As the terms of the agreement make plain, however, such is not the case: VITA's ownership and interests are separate from Final Analysis's under the agreement, and VITA does not receive any interest in or ability to control Final Analysis's operations.[120]

2. Under the Final Analysis/VITA Agreement, VITA Retains De Facto Control Over Its Licensed Facilities

Contrary to Leo One USA and CTA's claim, the Final Analysis/VITA agreement does not deprive VITA of de facto control over its own licensed facilities.[121] Furthermore, it is axiomatic under the factors established Intermountain line of cases that the agreement does not divest VITA of de facto control of its operations or give Final Analysis the ability to influence or control VITA's operations.[122]

The Intermountain case outlined six factors for determining whether a licensee has retained de facto control over its licensed operations:

> . . . [i] unfettered use of all facilities and equipment used in connection [with those facilities]; [ii] day to day operation and control; [iii] determination

---

[119]See,e.g., Leo One USA Comments at 20-21 (citing Notice at ¶ 13).

[120]See, e.g., Final Analysis/VITA agreement at Article V.

[121]See Leo One USA Comments at 22 (citing Leo One USA, Petition to Deny, Application of Volunteers in Technical Assistance, File No. CSS-91-007(3); 30-DSS-AMEND-94; 40-SAT-P/LA-96, filed on February 23, 1996); CTA Comments at 5-6.

[122]See Intermountain Microwave, 24 Rad. Reg. (P&F) 983 (1963) ("Intermountain").

> of and the carrying out of policy decisions, including the preparation and filing of applications with [the] Commission; [iv] employment, supervision, and dismissal of personnel; [v] payment of financial obligations including expenses arising out of operation; and [vi] receipt of moneys and profits derived from the operation of [] facilities.[123]

The Commission has held moreover, that these Intermountain factors "represent the normal incidents of responsibility for the operation and control of a [] facility."[124] Reviewed under these factors, the Final Analysis/VITA agreement does not deprive VITA of de facto control of its licensed facilities.[125]

Unfettered Use of Facilities and Equipment. The agreement demonstrates that VITA retains unfettered use of its facilities and equipment. It specifies that VITA is the sole owner and possesses exclusive operational control over its transponders licensed under VITASAT-1R.[126] In addition, the agreement specifies that VITA retains ownership and control of its of earth stations and terminal hardware and software.[127] Moreover, as the Commission found in approving a similar agreement that VITA previously entered into with CTA, while the contract between VITA and Final Analysis expressly provides that VITA will lease 50% of the capacity on VITA's frequencies to Final Analysis, the fact that VITA has

---

[123]See Intermountain, 24 Rad. Reg. at 984.

[124]See, e.g., Ellis Thompson Corp., 76 Rad. Reg. 2d (P&F) 1125, 1127 (1995).

[125]The Commission has repeatedly emphasized, moreover, that there is no exact formula for applying these factors to determine whether control has been transferred, and it will look to the specific facts and circumstances presented in each case. See Data Transmission Co., 44 F.C.C.2d 935, 936 (1974).

[126]See Final Analysis/VITA Agreement at Article V.

[127]See id.

entered into such a lease arrangement is "itself an indication that it has full capacity to 'use' the satellite."[128]

Day-to-Day Operations. While it is true that Final Analysis has telemetry, tracking and control ("TT&C") responsibilities over the satellite under its arrangement with VITA, this does not deprive VITA of day-to-day control of its licensed frequencies. The contract provides that VITA retains control over the transponders operating on its frequencies, as well as the right to direct operation of its transponders and the use of its signals on the satellite in accordance with FCC requirements.[129] In similar circumstances, the Commission has authorized an agreement in which direct broadcast satellite licensee USSB purchased a payload of five transponders on a satellite owned and commanded by Hughes, where USSB retained "full operational control" over the five transponders purchased from Hughes, including the ability to cease transmissions if it ever became necessary to do so.[130]

Policy Decisions. The Final Analysis/VITA contract firmly establishes that VITA is to determine and carry out policy decisions, including preparing and filing applications with

---

[128]See Application of Volunteers in Technical Assistance, File Nos. CSS-91-007(3); 30-DSS-AMEND-94, Order and Authorization, 11 FCC Rcd 1358, 1366 (1995) ("VITA Authorization Order"). This was true even though, unlike the terms of the Final Analysis/VITA Agreement in which no revenues are shared, revenues were to be pooled under the CTA/VITA Agreement.

[129]See Final Analysis/VITA agreement at Article V.

[130]See United States Satellite Broadcasting Company, 7 FCC Rcd 7247, 7249 (1992).

the Commission, with respect to its operations.[131] Contrary to CTA's claim,[132] moreover, VITA will not use any of its capacity to serve Final Analysis customers.

Employment and Personnel. VITA maintains its own personnel under the contract. Final Analysis personnel involved with the satellite are separate from, and have no contact with VITA.

Financial Obligations. VITA retains "financial obligations" with respect to operation of its licensed frequencies. Final Analysis has no interest in VITA that is inconsistent with any other investment interest the Commission has deemed acceptable for fiduciary purposes.[133]

Receipt of Moneys and Profits. VITA and Final Analysis maintain separate revenues under the agreement. All fees charged by VITA for use of its capacity and associated ground facilities are billed and retained by VITA. All fees charged by Final Analysis for use of Final Analysis's leased capacity and associated ground facilities are billed and retained by Final Analysis.[134]

In sum, the Final Analysis/VITA agreement meets the Intermountain factors for a finding that VITA retains de facto control over its licensed operations. Furthermore, the

---

[131]The agreement provides, in particular, that VITA will make the necessary filings to obtain Commission licenses, permits and authorizations necessary to build, launch and operation the satellite with VITA's capacity, and that VITA is responsible to maintain its FCC licenses in good standing, and pay all legal fees associated with maintaining the licenses for VITA's gateway earth stations and user terminals. See Final Analysis/VITA agreement at Article IV.

[132]See CTA Comments at 6.

[133] See e.g., Wilner & Scheiner, 103 F.C.C.2d 511 (1985).

[134]See Final Analysis/VITA Agreement at Article VI.

agreement does not evidence the type of arrangement that should concern the Commission with respect to intent to evade Commission licensing rules to inhibit competition. Final Analysis has absolutely no incentive to "compete" with VITA less vigorously. VITA and Final Analysis are in different markets. VITA is a non-profit, humanitarian aid organization providing educational, health, environmental, disaster relief, and technical communication services to developing countries. For Final Analysis, however, the arrangement is related to use of its experimental satellite for the purpose of testing deployment of commercial Little LEO services, and does not diminish in any way Final Analysis's plans vigorously to implement a fully competitive commercial constellation should it receive a license in the second NVNG MSS proceeding round.

B. Exclusion of Final Analysis Would Not Serve the Public Interest

The proposed rule restricting first round licensees and their affiliates from participation in the second processing round is designed to advance the Commission's important public interest goals of promoting competition through new entry and facilitating the availability of a wide variety of new Little LEO services to consumers. Not only are CTA and LEO One USA's claims regarding the Final Analysis/VITA agreement factually incorrect, legally spurious and entirely without merit, the conclusion that they advocate -- exclusion of Final Analysis on the basis of the agreement -- would defeat the Commission's public interest goals.

A determination that Final Analysis must be excluded on the basis of its agreement with VITA would only harm VITA's important humanitarian goals. The Agreement specifically provides that it may be terminated if any Commission authorizations granted pursuant to the Agreement pose a serious potential of disqualifying Final Analysis from

prosecuting its second round application.[135] Thus, if the Commission determines that its agreement with VITA would disqualify it as a second round NVNG MSS applicant, Final Analysis would simply terminate the agreement. The only real consequence of this would be the deprivation of developing countries of the important services that VITA can provide, contrary to the Commission's public interest goals.

Exclusion of Final Analysis from the second round would serve no positive purpose. Final Analysis has already amply demonstrated that there are numerous ways of accommodating all second round applicants in the available spectrum, so there is no basis for seeking exclusion of Final Analysis for the purpose of accommodating other parties in the round. Also, Final Analysis is one of two or three viable potential competitors for high end, near real-time Little LEO services, and its exclusion would undermine the Commission's competitive goals. Even Leo One USA has suggested that the public interest would be best served by authorization in this round of at least two new entrants that will be capable of providing near real time services in the future.[136] Final Analysis is the only applicant, other than Leo One USA itself, that is committed to a market plan including near real time services. Moreover, to the extent that Final Analysis is one of most active parties helping to prepare for WRC-97, its exclusion from the second processing round may require the company to cease its participation in the WRC-97 preparation process.

---

[135]See Final Analysis/VITA agreement at Article X.

[136]See Leo One USA Comments at 16.

Accordingly, excluding of Final Analysis from the second processing round on the basis of its agreement with VITA is unwarranted by the facts, unsupported by the law, and would undermine the Commission's public interest goals for NVNG MSS.

IX. AMENDMENTS SHOULD BE POSTPONED UNTIL A BAND PLAN IS FINALIZED

The Commission should defer a filing date for amendments to second round applications until after a band plan for second round NVNG MSS licensees is finally determined. All four second round Little LEO applicants, moreover, have supported deferral of the current amendment filing deadline.[137]

Requiring applicants to file amendments under the existing timeframe would prematurely disrupt the potential for second round applicants to negotiate and conclude a mutually agreeable band plan. Additionally, there are a number of issues raised by the Notice and in the record regarding the form and substance of amendments to be filed that also may require further clarification to avoid misunderstanding, duplication and wasted effort. Deferral of the current amendment filing schedule to accommodate negotiation of an alternative band sharing plan also is consistent with the Commission's alternative dispute resolution policies.[138]

---

[137]See Leo One USA Corporation and CTA Commercial Systems, Inc., Motion for Deferral, filed January 7, 1997; Final Analysis Communication Services, Inc. and E-SAT, Inc. Comments on Motion for Deferral.

[138]See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991).

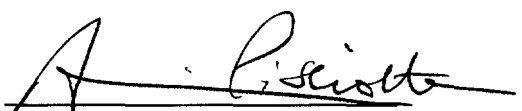
Final Analysis strongly urges the Commission at least to schedule another status conference to review technical questions and procedural ambiguities that may remain under the Notice and in the record before amendments are required to be filed.

X. CONCLUSION

For the reasons discussed above, Final Analysis urges the Commission to adopt one of the various frequency band plans and licensing approaches outlined herein to avoid mutual exclusivity and facilitate ultimate implementation of fully competitive Little LEO systems in the public interest.

Respectfully submitted,

FINAL ANALYSIS COMMUNICATION SERVICES, INC.

By: 
Philip V. Permut
Aileen A. Pisciotta
Peter A. Batacan

KELLEY, DRYE & WARREN L.L.P.
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

January 13, 1997

CERTIFICATE OF SERVICE

I, hereby certify that on this 13th day of January 1997, true copies of the foregoing "Reply of Final Analysis Communication Services, Inc." have been sent via first-class U.S. mail, postage prepaid, or hand delivered as indicated to:

*Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

*Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

*Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

*Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

*Donald H. Gips, Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 830
Washington, D.C. 20554

*Thomas S. Tycz, Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 811
Washington, D.C. 20554

*Karen Kornbluh
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Suite 800
Washington, D.C. 20554

*Cecily C. Holiday, Deputy Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 520
Washington, D.C. 20554

*Joslyn Read, Assistant Chief
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 818
Washington, D.C. 20554

*Paula Ford
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., 5th Floor
Washington, D.C. 20554

*Cassandra Thomas
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 810
Washington, D.C. 20554

*Fern J. Jarmulnek, Chief
Satellite Policy Branch
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 518
Washington, D.C. 20554

*Harold Ng, Chief
Satellite Engineering Branch
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 512
Washington, D.C. 20554

*Damon C. Ladson
Satellite & Radiocommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 803
Washington, D.C. 20554

International Transcription Services, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Bill Gamble, Director
Office of Spectrum Plans and Policies
National Telecommunications and
Information Administration
Department of Commerce, Room 4099
Washington, D.C. 20230

William T. Hatch, Project Manager
National Telecommunications and
Information Administration
1401 Constitution Avenue, Room 4076
Washington, D.C. 20230

Albert Halprin
Stephen L. Goodman
Halprin, Temple & Goodman
Suite 650 East Tower
1100 New York Avenue, N.W.
Washington, D.C. 20005
Counsel for ORBCOMM

Henry Goldberg
Joseph Godles
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C. 20036
Counsel for VITA

Robert A. Mazer
Albert Shuldiner
Vinson & Elkins
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for LEO ONE USA

Peter Rohrbach
Julie Barton
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004
Counsel for GE STARSYS

Phillip L. Spector
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, N.W.
Washington, D.C. 20036
Counsel for CTA

Leslie A. Taylor
Guy Christiansen
Leslie Taylor Associates, Inc.
6800 Carlynn Court
Bethesda, MD 20817-4301
Counsel for E-SAT

*Dorothy Conway
Federal Communications Commission
1919 M Street, N.W.
Room 234
Washington, D.C. 20554

Timothy Fain
OMB Desk Officer
725 17th Street, N.W.
10236 NEOB
Washington, D.C. 20503

Philip V. Otero
GE American Communications, Inc.
Four Research Way
Princeton, New Jersey 08540

Wayne V. Black
John Reardon
Susan L. Chenault
Keller and Heckman L.L.P.
1001 G. Street, N.W., Suite 500 West
Washington, D.C. 20001

Scott Blake Harris
Gibson Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington D.C. 20036

Gerald Musarra
Senior Director
Commercial Policy & Regulatory Affairs
Lockheed Martin Corporation
1725 Jefferson Davis Highway
Arlington, VA 22202

Charles Ergen, President
E-SAT, Inc.
90 Inverness Circle, East
Englewood, CO 80112

F. Thomas Tuttle, General Counsel
Patricia A. Mahoney, Senior Counsel
Regulatory Matters
Iridium L.L.C.
1401 H Street, N.W., Suite 800
Washington, D.C. 20005

James A. Kirkland
Jennifer A. Purvis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

A.J. Cabodi
Vice President, Manufacturing
U.S. Oil & Refining Co.
3001 Marshall Avenue
Tacoma, WA 98421

Clayton Mowry
Lon Levin
Satellite Industry Association
225 Reinekers Lane, Suite 600
Alexandria, VA 22314

Nelson Fetgatter
Vice President
Garner Environmental Services, Inc.
314 Allen Genoa Road
Houston, TX 77017

William D. Wallace
Crowell & Moring L.L.P.
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Seiji Tanaka
Director General, Radio Department
Telecommunications Bureau
Ministry of Posts and
Telecommunications, Japan
1-3-2, Kasumigaseki
Chiyoda-ku, Tokyo
100-90 Japan

Thomas J. Keller
Verner, Lipfert, Bernhard,
McPherson and Hand, Chartered
901-15th Street, N.W., Suite 700
Washington, D.C. 20005